IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 50 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RADHESHYAM KANTARAM YADAV

Versus

STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 50 of 1998
MR BA SURTI for Petitioner No. 1-2
MR AY KOGJE, APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE M.S.SHAH

Date of decision: 11 & 13/02/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

This is an appeal against the judgment and order dated 4.12.1997 rendered by the learned Additional Sessions Judge, Panchmahals at Dahod in Sessions Case No. 64 of 1997 convicting both the appellant-original accused for the offences punishable under Section 302 read with Section 114 IPC and also for the offence punishable under Section 498-A IPC and sentencing both the appellant-accused to imprisonment for life and to pay a fine of Rs.1000/- in default rigorous imprisonment for one month. The learned Additional Sessions Judge did not pass any separate order of sentence for the offence punishable under Section 498-A IPC.

2. The prosecution case was that Anand Kantaprasad Yadav lodged the FIR dated 4.2.1997 with the Police Station at Dahod to the effect that accused No. 1 Radheshyam Kantaram Yadav was married to his sister Kiran (hereinafter referred to as "the deceased") on 21.11.1996. Accused No. 2 is the mother of accused No. 1. Accused No. 1 was employed in the Railway Workshop at Dahod. After her marriage, the deceased-sister Kiranben was staying with her husband-accused No.1 and mother-in-law, accused No. 2 at Dahod and after the said marriage, the deceased had gone to her parents' place at Ratlam three times. On the last occasion, the deceased had gone to her parents' place at Ratlam on 12.1.1997 and had complained about the harassment from the accused. On 19.1.1997, accused No.1 had gone to Ratlam to take the deceased back to the matrimonial home at Dahod. While going back to Dahod, the deceased had broken down and stated that the deceased was threatened by accused No. 1 that the deceased will be burnt to death. However, the deceased was persuaded to go with her husband to Dahod. In the evening of 1.2.1997, the complainant had received a telephonic message from Dahod that the deceased had suffered burn injuries and was undergoing treatment at a hospital. Hence, the complainant, his father and elder brother had all gone to Dahod where they found that the complainant's sister-Kiran had sustained serious burn injuries and was unconscious. When the deceased regained consciousness, she informed the complainant that her husband-accused No. 1 had gone for his job at 11.00 AM in the morning on 1.2.1997 and thereafter her mother-in-law, accused No. 2, had picked up quarrel with the deceased. When accused No. 1-husband returned from work, her mother-in-law, accused No. 2, had instigated accused No. 1 and accused No. 1 had beaten up the deceased and, therefore, the deceased had become unconscious. When she regained consciousness, she found that she was burning and, therefore, she had shouted. She was set on fire by both the accused by sprinkling

kerosene on her body. The deceased had also told the complainant that both the accused were in the habit of finding fault with the deceased on petty issues and were harassing her and beating her up and were meting out physical and mental cruelty. Ultimately, the deceased succumbed to the injuries on 6.2.1997, both the accused were arrested on the same day, while accused No. 2 came to be released after a month, accused No. 1 remained an under trial prisoner throughout the trial. Both the accused were charge-sheeted.

3. At the trial, the prosecution examined three medical witnesses at Railway Hospital at Exhs. 12, 15 and 20. Executive Magistrate-Mr CJ Patel who had recorded the dying declarations of the deceased was examined at Exh. 24. Complainant-Anand Kantaprasad Yadav (brother of the deceased) and the father and another brother of the deceased were examined at Exh. 27, 28 and 29 respectively. Investigating Officer-PSI LM Damor was examined at Exh. 30. The documentary evidences comprising of the FIR, panchnama of the scene of offence, inquest panchnama, post-mortem note, FSL report and the dying declarations recorded by the Executive Magistrate and also the statements purporting to be the statements given by the deceased before the police will be referred to hereinafter at the appropriate stage.

4. The learned Sessions Judge held that there was no eye witness of the incident, but the charge against both the accused was proved beyond reasonable doubt on the basis of the circumstantial evidence and also on the basis of two dying declarations given by the deceased before the Executive Magistrate and the doctor at the hospital. The first dying declaration was given by the deceased at 12.00 midnight i.e. on the night between 1st and 2nd February, 1997 which is at Exh. 25. The second dying declaration was given by the deceased from 8.05 to 8.35 PM on 3.2.1997 which is at Exh. 26. The learned Sessions Judge held that the deceased had suffered 90% burn injuries and that from her dying declaration recorded in the evening on 3.2.1997 before the Executive Magistrate and the doctor at the hospital as well as from the evidence of the complainant, it was clear that the deceased was subjected to harassment and dowry demand and that on the date of the incident also, there was harassment by both the accused and also physical beating up of the deceased by accused No. 1 and that there was also dowry demand by the accused in the evening just prior to the incident. The learned Sessions Judge held that from the panchnama of the house of the accused where

the deceased was residing with the accused, it transpired that the kerosene was found on the entire floor of the middle room of the quarter consisting of two rooms and the kitchen and the kerosene stove was also lying in the same middle room, but the gas stove was found in the kitchen. The learned Sessions Judge found from the FSL report that the pieces of burnt saree which was worn by the deceased were found in the said middle room and some pieces were also found in the kitchen. Smell of kerosene was also found on the burnt pieces of saree. The learned Sessions Judge held that the incident in question did not take place in the kitchen but it took place in the middle room. The learned Judge examined the theory of accident pleaded by the accused at the trial, but ruled out the said theory and also examined whether the incident in question was a case of culpable homicide or suicide, and ultimately convicted the accused of culpable homicide amounting to murder punishable under Section 302 IPC and also for the offence punishable under Section 498-A.

5. At the hearing of the appeal, Mr Bharat A Surti, learned counsel for both the appellant-accused has made the following submissions :-

(i) The learned Sessions Judge has erred in not accepting the case of the accused at the trial that the incident in question was an accident pure and simple and that it was only on account of the accident that the deceased had sustained injuries while making tea in the evening and there was no question of holding the accused guilty of the offence of murder when the deceased-wife had given as many as four dying declarations and in none of them she had made any statement that either of the accused had sprinkled kerosene on the deceased or that either of the accused had lighted the match stick which resulted into fire and the consequential burn injuries on the deceased.

(ii) In her first dying declaration which was recorded at 12.00 midnight on the date of the incident i.e. at the night between 1st and 2nd February, 1997, the deceased had clearly stated that while preparing tea on the stove, her saree caught fire. In the said first statement, she has not made any allegation about any harassment by either of the accused or about any demand and, therefore, apart from the accused not being guilty of the offence of murder, the accused cannot be found guilty even of the offence

punishable under Section 498-A IPC.

(iii) In her second dying declaration before the PSI on 2.2.1997 at 10.00 A.M., the deceased had clearly stated that when she had gone to the kitchen to make tea, kerosene had come out of the primus stove, and the match stick lighted to light the gas stove had fallen on the floor and, therefore, her clothes had caught fire and she had sustained burn injuries. In the said statement she had also stated that she had good relations with her husband - accused No.1 and even with her mother-in-law, accused No.2. There were usual ordinary altercations about household work, but there were no serious disputes. The said statement was recorded in presence of the Emergency Duty Medical Officer at 10 O'clock in the morning of 2.2.1997 and, therefore, the said statement was required to be accepted.

(iv) Even in her third dying declaration recorded by the Executive Magistrate at 8.00 P.M. on 3.2.1997, the deceased had not stated that either of the accused had poured or sprinkled kerosene on the deceased or had lighted the match stick and, therefore, the said dying declaration is also consistent with the theory of accident. Relying on the said dying declaration, it is submitted that in view of the fact that both the accused tried to extinguish fire and as borne out by the other evidence that the accused themselves had also suffered burn injuries, it was not possible to hold that the accused had intended to cause death of the deceased. On the contrary, they had attempted to save the deceased and had also taken her to the hospital. This conduct of the accused is certainly inconsistent with the offence of murder with which the learned Sessions Judge has convicted the accused.

(v) The deceased had also given the fourth dying declaration on 4.2.1997 which is not exhibited by the learned Sessions Judge, but the Investigating Officer Mr Damor was cross-examined with reference to the said statement and, therefore, the said statement was required to be exhibited. The Investigating Officer had also referred to the said statement in his examination-in-chief and, in fact a copy of the said statement was also supplied to the accused alongwith the other papers when the chargesheet was filed and,

therefore also, the said statement was required to be exhibited. As per the said statement also, the incident was merely an accident and the said statement also explained how the kerosene came to be found on the floor and how the deceased sustained burn injuries. In the said statement, the deceased had stated that there was no dowry demand and there were only usual family disputes with the mother-in-law.

(vi) Although the father and brothers of the deceased had arrived from Ratlam to Dahod in the evening of 1.2.1997, the FIR was not lodged with the Dahod Town Police Station till 4.2.1997 and, therefore, the delay in lodging the complaint is fatal to the prosecution case.

6. On the other hand, Mr AY Kogje, learned Additional Public Prosecutor for the State has opposed the appeal and submitted that the learned Sessions Judge has rightly convicted the accused for the offence of murder as the tell-tale circumstances on record alongwith the dying declaration dated 3.2.1997 are sufficient to complete the chain and are consistent with the prosecution case of the accused having committed murder of the deceased by setting her on fire.

Reliance is also placed on the decision of the Constitution Bench of the Supreme Court in Laxman vs. State of Maharashtra, 2003(1) GLR 1, laying down that when the doctor has made an endorsement on the dying declaration that "the patient is conscious", it also means that the patient is in a fit state of mind to make the dying declaration and that when it is proved by testimony of the Executive Magistrate that the declarant was fit to make the statement, the dying declaration can be acted upon even without examination of the declarant by the doctor. It is submitted that in the instant case both the Executive Magistrate as well as the Doctor have been examined and they have deposed that the deceased was fit to make the dying declaration on 3.2.1997 at 8.00 PM.

7. Before proceeding to deal with the submissions of the learned counsel, it is necessary to refer to the following principles enunciated by the Apex Court :-

In Om Prakash vs. State of Punjab, (1992) 4 SCC 212 = 1992 SCC (Cri) 848, the Apex Court held that in case of a woman dying because of the burn injuries, it is the duty of the Court, in a case of death because of

torture and demand for dowry, to examine the circumstances of each case and evidence adduced on behalf of the parties, for recording a finding on the question as to why the death has taken place. While judging the evidence and the circumstances of the case, the Court has to be conscious of the fact that a death connected with dowry takes place inside the house, where outsiders who can be said to be independent witnesses in the traditional sense, are not expected to be present.

In Baldev Krishan vs. State of Haryana, AIR 1997 SC 1666, the Apex Court has held that when a young house wife dies due to burn injuries in her matrimonial home and physical and mental ill-treatment and harassment of the deceased by her in-laws on account of insufficient dowry is shown and no other person except the accused was staying in the house, the accused is required to explain the circumstances under which the deceased sustained burn injuries.

8. It is required to be noted at the outset that the accused did not lead any evidence at the trial and even in his further statement under Section 313 Cr.PC, the accused did not make any attempt to explain the incident even though the contents of the dying declaration Exh. 25 were put to them in question Nos. 22 to 28 except stating that whatever was stated therein was false.

9. Having carefully gone through the evidence on record and having given careful consideration to the arguments of the learned counsel for the parties, we are clearly of the view that there is no substance in the submission made on behalf of the appellant-accused that the instant case was one of accident. The deceased suffered 90% burn injuries. According to the defence case, the incident in question took place when the deceased was making tea after her husband- accused No.1 had returned home from work. Admittedly, there was a gas stove in the kitchen with a gas cylinder. It is, therefore, difficult to appreciate as to how a kerosene stove came to be opened and not only that, but kerosene was found on a large area of the floor in the middle room which was not the kitchen. The quarters occupied by accused No.1 consisted of three rooms i.e. two rooms and a kitchen. As per the panchnama of the scene of offence which was prepared on 2.2.1997 between 8.30 and 9.30 A.M., on entering the quarters the first room had iron cot and mattresses and in the middle room there was an iron cot, a few mattresses and other household kit. A brass stove i.e. a kerosene stove was also lying in the said middle room and the stove was surrounded by pieces

of burnt yellow saree. There was also a black plastic can in burnt condition and the kerosene was found on the floor of the room. The third room i.e. the kitchen had a gas stove on a shelf with a gas cylinder with a water tank close by. The police took the kerosene stove, a half burnt kerosene can, match stick box and the pieces of burnt saree as muddamal articles. As per the report of the Science Officer, Regional Forensic Science Laboratory, Gujarat State, Surat at Exh.12, kerosene smell was emanating from the half burnt pieces of yellow saree. As per the panchnama, which is not disputed, there was a gas stove alongwith a gas cylinder in the house of the deceased. Even as per two statements alleged to have been given by the deceased before the police in the morning of 2.2.1997 and again in the morning of 4.2.1997, on which statements the defence is relying, the deceased had lighted a match stick to light the gas stove and not the kerosene stove. It is, therefore, not possible to appreciate as to how kerosene came to be found on the floor of the middle room or on the saree of the deceased. These pieces of evidence are certainly inconsistent with the theory of accident suggested by the defence, so also the fact that kerosene was found on the floor of the middle room and not in the kitchen also is inconsistent with the defence theory of accident. The accused did not make any attempt to show how the kerosene stove or the kerosene can came on the scene and how the kerosene had fallen on the floor, when there was already a gas stove and a gas cylinder in the kitchen.

10. As regards the argument of Mr Surti for the accused that as per the first dying declaration recorded by the Executive Magistrate at midnight between 1st and 2nd February, 1997, the deceased had stated that she had suffered burn injuries while preparing tea on stove, it is required to be noted that the deceased had suffered 90% burn injuries all over her body except the face and the head at about 4.30 P.M. on 1.2.1997. The deceased was rushed to the hospital at 5.10 P.M.. The deceased was not in a position to give any statement even at 7.45 P.M. as per the certificate of Dr. Rajiv Jain, DMO at the Western Railway Hospital as per Exh.19 and it was only at about 12.00 midnight that the statement of the deceased was recorded. The deceased was hailing from Ratlam in Madhya Pradesh and was married to accused No.1 in the month of November, 1996. From the dying declaration given by her before the Executive Magistrate in the evening of 3.2.1997 it is clear that the deceased was speaking in Hindi and, therefore, the statement recorded in Gujarati on the midnight of the date of

incident, barely a few hours after the deceased had sustained 90% burn injuries, is required to be read in that context. In fact, in the first statement, the deceased had even stated that she was brought to the hospital by her neighbours, whereas according to the accused and even as per the dying declaration recorded on 3.2.1997, it was the accused who had taken the deceased to the hospital in the evening of 1.2.1997. We are, therefore, of the view that the dying declaration given by the deceased before the Executive Magistrate two days after the incident at 8.05 P.M. on 3.2.1997 in Hindi has to be preferred to the sketchy statement in Gujarati recorded just a few hours after the incident in which the deceased had suffered 90% burn injuries. As per the said dying declaration recorded between 8.05 and 8.35 P.M. on 3.2.1997, the deceased had stated in Hindi as under :-

"When this incident occurred, there was a quarrel with my mother-in-law. My husband had gone for work at 11.00 AM and he returned at 4.00 PM. On return, my husband had beaten me up and my mother-in-law was quarrelling. My husband beat me up with force after stating - "you have not given any happiness to my mother". On account of the said beating, my ribs were hurting. Thereafter I had gone to make tea. Before that, my husband had quarreled with me. The stove which was lying there had turned sideways and some kerosene had come out and in that snatching, the kerosene fell on my saree and blouse. When my husband was beating me up, my mother in law had gone out of the room. She (mother in law) stated that "when you die, my son can marry. Whatever dowry you have brought, you yourself have enjoyed and I have not got anything out of it." Before the stove went in flames, there was a match stick in my hand and two-four match sticks were kept by my husband. At that time because my saree caught fire, my saree and blouse got burnt up and my husband made an attempt to extinguish the fire with a small napkin and also poured water on me and then brought me to the hospital.

My marriage took place on 21.11.1996 and from then onwards my mother-in-law was quarreling with me on small issues and was mentally harassing me immediately after the marriage. I did not disclose this fact to my parents and my husband had told me 2-3 times that "just as the Ratlam girl was killed, I will murder you in

Dahod". He used to give such threats. Every time, my mother-in-law and her son (both the accused herein) were jointly demanding dowry from me. When I gave my first statement, I was not fully conscious and was under mental pressure. When I was in flames, my mother-in-law had come to extinguish fire and was crying and I had shouted loudly. I have studied upto M.Com and my husband has studied upto 11th standard."

11. The aforesaid statement was recorded by the Mamlatdar and Executive Magistrate, Dahod in presence of Dr Shukla who certified that the deceased had given the above statement in his presence; however, the deceased was not in a position to sign the statement or to put thumb impression thereon as she had sustained 90% burn injuries. In his deposition at Exh. 20 also, said Dr. Shukla (PW 3) stated that the deceased was conscious and was fit to give the statement and was responding to verbal questions put to her and was oriented about the time, place and persons who were present before the deceased when she gave the above dying declaration and that the Executive Magistrate, Dr Sharma, the nurse and the scribe (person brought by the Executive Magistrate who was writing down the statement) were present. No relatives of the deceased were present when the deceased gave the said dying declaration. Dr Sharma also gave the certificate to that effect at 8.00 PM on 3.2.1997 (which is at Exh. 21).

12. The above dying declaration recorded by the Executive Magistrate is required to be contrasted with the two statements allegedly given by the deceased before the Investigating Officer at 10.00 AM on 2.2.1997 and on 4.2.1997 (time not specified). As per the statement allegedly given by the deceased at 10.00 AM on 2.2.1997, accused No.1-husband had gone for work at 11.00 AM on 1.2.1997 and the deceased and accused No.2-mother-in-law were present in the quarter. At about 4.30 in the evening, the husband returned home. Hence, the deceased had gone to make tea. At that time, the mother-in-law had spilt kerosene from the primus stove on the floor and after the deceased lighted the match stick to light the gas stove and threw the match stick, the kerosene on the floor caught fire and, therefore, her saree was caught into flames and upon the deceased shouting, her mother in law and husband rushed to her, took out her saree and poured water to extinguish the fire. Thereafter, they put a blanket on her to extinguish the fire and the neighbours also rushed and took the deceased to the hospital. The deceased and her husband had good

relations and the deceased did not have any quarrel or dispute with her mother in law except minor altercations on small household issues. For making tea, she had lighted the gas stove and thrown the match stick on the floor which caused fire on the floor because of the kerosene lying there and, therefore, her clothes had caught fire and she sustained burn injuries from her feet to her chin. She was conscious and in a position to speak well, but she was not in a position to sign because she sustained burn injuries all over her body, chin and feet. The said statement Exh. 10 is alleged to have been recorded by the PSI in charge of the Dahod Police Station and is alleged to have been signed by Dr Jain at 10.00 AM on 2.2.1997 as Emergency Duty Doctor, but nowhere in his deposition at Exh. 15, said Dr Rajiv Jain (PW 2) has made any reference to the said statement. In his deposition, Dr Jain has referred to only one statement or dying declaration recorded in his presence and that is the only dying declaration at Exh. 25 which was recorded by the Executive Magistrate at midnight between 1st and 2nd February, 1997. No reference whatsoever has been made by Dr Jain to the statement recorded by PSI-Damor at 10.00 AM on 2.2.1997. Apart from the so-called second dying declaration, there is a so-called fourth dying declaration allegedly recorded by the same PSI on 4.2.1997 which was not exhibited by the learned Sessions Judge, but which is required to be exhibited in view of the fact that a copy of the same was given to the accused alongwith the papers at the time of filing the charge sheet and the Investigating Officer referred to the said statement and the counsel for the accused was also permitted to refer to the said statement in cross-examination of the said Investigating Officer. Apart from the fact that the deceased was in the hospital right from the beginning of 1.2.1997 and she succumbed to the burn injuries on 6.2.1997 and her father or brothers were at the hospital on 4.2.1997 and the statement is alleged to have been recorded after her brother Anandprasad filed the FIR with the police, no question is put to the brother or father of the deceased about any such statement given by the deceased before the PSI on 4.2.1997. Apart from this aspect, the said statement to which we have given Exh. 31/A, contains a story to the effect that after the husband-accused No. 1 left for work at 11.00 AM on 1.2.1997, the deceased and her mother in law, accused No. 2, had a quarrel about serving food and accused No. 2 had kept taunting the deceased and after accused No.1 returned, mother-in-law, accused No. 2 had instigated accused No. 1. Hence, accused No. 1 had started beating her and thereafter as the quarrel intensified, her husband said that he would commit

suicide and the deceased and his mother can stay together and after stating so, the husband took the kerosene can and was about to pour kerosene on him, the deceased caught hold of the kerosene can and stated that she would rather commit suicide so that the mother and son can stay together. In the process of snatching of the kerosene can, the mother-in-law (accused No. 2) also joined and stated that she would rather commit suicide so that the deceased and accused No. 1 can stay together. In the said process of snatching of the kerosene can by all three of them, kerosene fell on the clothes of the deceased and also on the clothes of the husband (accused No. 1) and, therefore, kerosene had also fallen on the floor in the quarters. Thereafter, the quarrel subsided and the deceased went to make tea by lighting the gas stove. After lighting the gas stove, she threw the burning match stick on the floor whereupon the floor caught fire which engulfed the clothes of the deceased which already had kerosene and since she was in flames she started shouting whereupon her husband and mother-in-law, who were already there, poured water on the deceased to extinguish the fire. In the meantime, the neighbours also rushed and extinguished the fire and pulled the burning cloth from the body of the deceased and took her to the hospital in a rickshaw. The incident had happened in the above manner and her husband or mother-in-law had not intentionally poured kerosene on the deceased or set her on fire in order to kill her, but because of the quarrels and mental and physical harassment, the deceased had got excited and there was a snatching of the kerosene can and, therefore, the kerosene had fallen on the floor and the incident had taken place. The mother-in-law was of quarrelsome nature and, therefore, she was always quarreling with the deceased. There was no demand of dowry or of any such demand from the deceased. The deceased had not disclosed the above facts in her previous statement because at that time she was in mental tension because of agony and now that she had recovered and was fully conscious, she had declared the above facts. However, having sustained burn injuries on both her hands, she could not sign or put thumb impression although she was literate.

13. A perusal of the above statements clearly indicates that the statement at Exh. 25 recorded by the Executive Magistrate between 8.05 and 8.30 PM on 3.2.1997 is the only statement which can be relied upon as the dying declaration. The so-called statement at Exh. 10 alleged to have been recorded by the PSI on 2.2.1997 (at 10.00 AM) and the so-called statement allegedly recorded by the same PSI on 4.2.1997 (without any time mentioned)

were not recorded in the presence of the Executive Magistrate, although the Executive Magistrate had already gone to record the dying declaration of the deceased at the midnight between 1st and 2nd February, 1997 and also in the evening of 3.2.1997. The so-called statement recorded by PSI on 4.2.1999 was not recorded in presence of any Medical Officer though the deceased was confined to the hospital right from 1.2.1997 to 6.2.1997 when she succumbed to the injuries. Even Dr Jain whose purported signature is found on the so-called statement recorded by the PSI on 2.2.1997 at 10.00 AM has not stated a word about the said statement in his examination-in-chief nor is any such statement referred to in the cross-examination. The Investigating Officer has not even referred to the said statement Exh. 10 in his examination-in-chief, but the said statement is only referred to by the defence counsel in the cross examination of the Investigating Officer.

14. Apart from these serious infirmities on account of which no reliance can be placed on the said so-called statements allegedly recorded by the PSI on 2.2.1997 and 4.2.1997, the contents of the said statements also indicate that the statements were recorded in order to absolve the accused from any complaint about dowry demand. In fact, the so-called statement dated 4.2.1997 exhibited at 31/A comes out with a fantastic theory that initially it was the husband who offered to commit suicide and thereafter the deceased offered to commit suicide and ultimately the mother in law offered to commit suicide and each one tried to snatch the kerosene cane for pouring kerosene on himself or herself and that is how the kerosene fell on the clothes of the deceased and also on the clothes of the husband. Apart from the inherent improbability of the story put up in the said statement, there is no dispute about the fact that minor burn injuries suffered by the husband were only on his finger tips and on his toes though, according to the defence version, the husband had tried to save the deceased when she was burning. If the story put up in the said statement dated 4.2.1997 was true, even the husband with kerosene drenched clothes would have been caught in flames which undisputably did not happen. The so-called statements dated 2.2.1997 and 4.2.1997 are, therefore, required to be discarded as not genuine and not worthy of any credence.

15. In view of the above discussion, particularly in view of the fact that there was a gas stove with a gas cylinder in the kitchen and, therefore, there was no need for any use of kerosene stove at that point of time and that kerosene was found on the floor of the middle room and not the kitchen, also in view of the fact that kerosene smell was emanating

from the burnt saree pieces of the deceased and that in her dying declaration recorded by the Executive Magistrate in the evening of 3.2.1997 (i.e. after about 51 hours from the time of the incident) wherein she had referred to the dowry demand and physical as well as mental harassment by the mother-in-law and also mental and physical harassment and torture by her husband-accused No. 1 and also in "snatching of kerosene", it is impossible to hold that there was even any probability or possibility that the deceased sustained 90% burn injuries on account of any accident as per the defence story.

16. After ruling out the theory of accident, the next question that arises for our consideration is whether the death of the deceased was homicidal or suicidal.

17. Mr Surti, learned counsel for the appellant-accused has vehemently submitted that the material on record is sufficient to indicate that the accused had not caused the death of the deceased because the deceased has not stated even in any of the dying declarations recorded by the Executive Magistrate that either of the accused had poured or sprinkled any kerosene on the clothes or the body of the deceased and that either of the accused had lighted any match stick. On the contrary, even as per the statement of the deceased before the Executive Magistrate at Exh. 25, both the accused had tried to extinguish fire by pouring water and by putting a napkin and the mother-in-law, (accused No. 2), was also crying after the incident and the husband had taken the deceased to the hospital. It is, therefore, vehemently submitted that all these acts of the accused are clearly inconsistent with the intention to cause death of the deceased and that even if the theory of accident is not accepted, at the highest it would be a case of suicide.

18. Having carefully considered the evidence on record, while the dowry demand and the physical as well as mental harassment to which the deceased was subjected may sway us to the finding of the homicidal death, it is important to note that the deceased who gave her dying declaration before the Executive Magistrate in her mother tongue Hindi two days after the incident and even after arrival of her father and brothers from Ratlam, has not stated a word that it was either of the accused who poured or sprinkled any kerosene on the deceased or that either of the accused lighted and threw any match stick either on the floor or on the body of the deceased; on the contrary she stated that both the accused tried to extinguish fire after the deceased was caught in flames and also took her to the hospital. As regards the snatching of kerosene stove or can referred to in the dying declaration (which is even referred to in the so-called

statements recorded by the PSI and on which the accused are relying), the same is consistent with the suicidal death of the deceased because it is quite probable that on account of the physical as well as mental harassments to which the deceased was subjected by the accused previously and also on the date of the incident and just before the incident, the deceased was fed up with her fate and decided to put an end to her life.

19. At this stage, we indicated to Mr Surti, learned counsel for the appellant-accused that even if the accused could not be said to be guilty of the offence of murder punishable under Section 302 IPC, the accused have been rightly convicted for the offence punishable under Section 498-A IPC as the deceased and accused No. 1 were married only in November, 1996 and the deceased had referred to the dowry demand and physical and mental torture to which the deceased was subjected by the accused till the incident of 1.2.1997. Looking to the evidence on record, though both the accused are required to be given benefit of doubt for the offence of murder punishable under Section 302 IPC, the accused are guilty of the offence of abetment to suicide punishable under Section 306 IPC. Section 306 reads as under:-

"306. Abetment of suicide.- If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

It is, however, submitted by Mr Surti that since the accused were charged only for the offences punishable under Sections 302 and 498-A IPC, the accused cannot be convicted for the offence punishable under Section 306 IPC. In support of the said submission, Mr Surti has placed reliance on the following decisions :-

(i) Sangaraboina Sreenu vs. State of A.P., AIR 1997 SC 3233.

(ii) Safimahmad Ibrahim Vora vs. State of Gujarat, 1993(2) GLR 1728

20. In this connection, it would be necessary to refer to the provisions of Sections 221 and 215 of the Cr.PC which read as under :-

"221. Where it is doubtful what offence has been committed.- (1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committing all or any of such offences, and any

number of such charges may be tried as once; or he may be charged in the alternative with having committed some one of the said offecnes.

(2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted for the offence which he is shown to have committed, although he was not charged with it.

215. Effect of errors.- No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice."

In view of the above provisions, the Criminal Court can convict an accused for an offence with which he is not charged although on facts found in evidence, he could have been charged for such offence and if the accused was not, in fact, misled by such error or omission in framing the charge and it has not occasioned a failure of justice.

21. Before dealing with the decisions cited by Mr Surti, we may refer to two decisions of the Supreme Court.

In Lakhjit Singh vs. State of Punjab, 1994 Supp. (1) SCC 173 wherein the accused was charged with the offence of murdering his wife by poisoning, the Apex Court held on facts that the offence of murder was not proved, but even though the deceased died by committing suicide, the accused was guilty of abetment of suicide and, therefore, guilty of the offence punishable under Section 306 IPC. When a pointed submission was made that after having been charged with only offence punishable under Section 302, the accused cannot be convicted for the offence punishable under Section 306, the Apex Court held as under :-

"9. The learned counsel, however, submits that since the charge was for the offence punishable under Section 302 Indian Penal Code, the accused were not put to notice to meet a charge also made against them under Section 306 IPC and, therefore, they are prejudiced by not framing a charge under Section 306 Indian Penal Code and; therefore, presumption under Section 113-A of Indian Evidence Act cannot be drawn and consequently a conviction under Section 306

> cannot be awarded. We are unable to agree. The facts and circumstances of the case have been put forward against the accused under Section 313 CrPC and when there was a demand for dowry it cannot be said that the accused are prejudiced because the cross-examination of the witnesses, as well as the answers given under Section 313 of the CrPC would show that they had enough of notice of the allegations which attract Section 306 Indian Penal Code also. That apart, what all Section 113-A of Evidence Act says is that the Court, having regard to the other circumstances of the case can presume. Therefore, the circumstances in this case would show that the accused have been demanding dowry even within a short period after the marriage and the deceased also had to live in her parent's house and it is the husband who went and brought her back. The deceased followed him and unfortunately, the incident has taken place. Since there is no direct evidence regarding administration of poison to the deceased as such, the only course left is to hold that the prosecution has proved only suicide. In these circumstances, Section 306 is attracted. For these reasons, the conviction of the appellants under Section 302 and sentence of imprisonment for life are set aside. Instead, they are convicted under Section 306 Indian Penal Code and each of them is sentenced to undergo rigorous imprisonment for 5 years and sentence of fine of Rupees 2000 with default clause is confirmed."

Respectfully following the aforesaid decision of the Apex Court, we see no reason why the conviction of the accused under Section 302 with Section 498-A cannot be altered to one under Section 306 with 498-A IPC as on facts we have found that the accused were demanding dowry within a short period after the marriage and there was physical as well as mental harassment and torture for insufficient dowry and the deceased committed suicide.

Similar view is taken in K. Prema S. Rao vs. Yadla Srinivasa Rao, 2003 (1) SCC 217. In the said decision it has also been held that where the accused is charged for the offence of causing death (Sec. 304B) and also for the offence punishable under Section 498-A IPC, presumption under Section 113-A of the Evidence Act could also be raised against him on same facts constituting offence of cruelty under Section 498-A IPC and the accused can be convicted for the offence under Section 306 without giving further opportunity of defence when he had ample opportunity to meet the charge under Section 498-A IPC. In the said case, the Apex Court sentenced the accused-husband to five years' rigorous imprisonment

with fine.

22. It is true that in Sangaraboina Sreenu vs. State of A.P., AIR 1997 SC 3233, a Bench of two learned Judges held as under :-

> "It is true that Section 222, Cr.P.C. entitles a Court to convict a person of an offence which is minor in comparison to the one for which he is tried but Section 306, IPC cannot be said to be a minor offence in relation to an offence under Section 302, IPC within the meaning of Section 222 Cr.PC for the two offences are of distinct and different categories. While the basic constituent of an offence under Section 302, IPC is homicidal death, those of Section 306 IPC are suicidal death and abetment thereof."

It appears that the Apex Court was not concerned in the above case with the offence punishable under Section 498-A IPC and the decision of a Co-ordinate Bench in Lakhjit Singh's case (Supra) was not brought to the notice of Their Lordships.

23. It is also equally true that in Safimahmad Ibrahim Vora vs. State of Gujarat, 1993(2) GLR 1728, a Division Bench of this Court acquitted the accused of the charge under Section 302 IPC and declined to convict him for the offence punishable under Section 306 IPC by purporting to act on the proposition laid down by the Apex Court in Kantilal vs. State of Maharashtra, AIR 1970 SC 359 that the Criminal Procedure Code gives ample power to the Courts to alter or amend a charge whether by the trial Court or by the appellate Court provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred again him and that convicting the accused in such case for the offence under Section 306 IPC would amount to framing a charge with a new and distinct offence at the fag end of the trial.

24. We would have been required to refer the matter to a Larger Bench, but in view of the fact that the Division Bench decided Safimahmad's case in 1993 and the aforesaid decisions of the Supreme Court in Lakhjit Singh (Supra) and in K Prema S. Rao's case (Supra) were rendered subsequently, this Court is required to consider the matter on the basis of the law laid down by the Hon'ble Supreme Court in subsequent decisions. In view of the provisions of Sections 221 and 215 of the Code of Criminal Procedure, we are inclined to follow the aforesaid decisions in Lakhjit Singh vs. State of Punjab, 1994 Supp. (1) SCC 173, and in K. Prema S. Rao vs. Yadla Srinivas Rao, 2003 (1) SCC 217. We would also

like to highlight the fact that in the facts and circumstances of the instant case, throughout the trial the learned Sessions Judge was called upon to decide whether the death occurred on account of homicide, suicide or accident. The learned Sessions Judge on appreciation of the evidence ruled out the defence of accident and also the theory of suicide and thereafter convicted the accused of the offence of murder punishable under Section 302 IPC.

25. As already discussed earlier, having confirmed the finding of the learned Sessions Judge that the accused were guilty of the offence under Section 498-A IPC and that the death did not take place on account of any accident, that leaves us with only two options; the death of the deceased was either a homicidal death or a suicidal death. Since in a criminal trial, the offence has to be proved beyond reasonable doubt, it is only on account of giving the appellant-accused benefit of doubt that we are not sustaining the conviction under Section 302 IPC.

26. In Shamnsahed M. Multtani vs. State of Karnataka, AIR 2001 SC 921, a Bench of three learned Judges of the Supreme Court after considering both its decisions in Lakhjit Singh and Sangaraboina Sreenu (Supra) made the following observations in the context of the question whether a conviction under Section 302 IPC could be altered to a conviction for the offence punishable under Section 304-B IPC even though there was no charge for the offence punishable under Section 304-B IPC. The Apex Court referred to the provisions of Section 464(1) Cr.PC and held that the conviction would be valid even if there is any omission or irregularity in the charge, provided it did not occasion a failure of justice, but the Criminal Court, particularly the superior Court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage and it is only if the aspect is of such a nature that non-explanation of it has contributed to penalizing an individual, the Court should say that since he was not given the opportunity to explain that aspect there was failure of justice on account of non-compliance with the principles of natural justice.

27. In the above case, the Apex Court has also pointed out the distinction between Section 304-B and Section 306 IPC. When an accused is charged with an offence punishable under Section 304-B IPC, the compulsory presumption arises under Section 113-B of the Indian Evidence Act.

On the other hand, when the Court considers the question whether the accused can be said to be guilty of

an offence punishable under Section 306 IPC, the presumption which may be raised by the Court would be under Section 113-A of the Indian Evidence Act.

In other words, the presumption under Section 113-B is a presumption of law which the accused must rebut after the prosecution proves the basic facts that the woman was subjected by the accused to cruelty or harassment soon before her death or in connection with any dowry demand and the death of the woman caused by any burn or bodily injury or occurs otherwise under normal circumstances within seven years of her marriage, the Court shall have to raise a presumption that such person had caused the dowry death.

It is in this context that the Apex Court has laid down that if the trial Court finds that the prosecution has failed to make out the case under Section 302 IPC but the offence under Section 304-B IPC has been made out, the Court has to call upon the accused to enter on his defence in respect of the said offence. Without affording such an opportunity to the accused, a conviction under Section 304-B IPC would lead to real and serious miscarriage of justice. Even if no such count was included in the charge, when the Court affords him an opportunity to discharge his burden by putting him to notice regarding the prima facie view of the Court that he is liable to be convicted under Section 304-B IPC unless he succeeds in disproving the presumption, it is possible for the Court to enter upon a conviction of the said offence in the event of his failure to disprove the presumption.

On the other hand, when the Court finds, on the basis of the evidence on record including the dying declaration of the deceased, that the offence under Section 306 IPC is made out, as in the facts of the instant case, the Court does not have to invoke the presumption of fact available under Section 113-A of the Indian Evidence Act. Accordingly, in the facts of the case at hand, the accused is not being convicted for the offence punishable under Section 306 IPC on the ground that he has not rebutted the presumption under Section 113-A of the Indian Evidence Act. Once we have ruled out the prosecution case that the accused had caused homicidal death of the deceased, the question of applying the provisions of Section 304-B IPC and consequential justification for remand does not survive.

28. In view of the above finding given by us that the accused were required to be given the benefit of doubt and, therefore, we are not confirming the conviction under Section 302 IPC, the necessary corollary would be that the death was suicidal and in view of the evidence

on record and conviction for the offence under Section 498-A IPC, abetment by the accused to the suicide of the deceased is too obvious to need any further discussion. Remanding the matter to the trial Court to give further opportunity of leading evidence would only mean further detention of the accused in custody without their being in a position to dislodge the statement of the deceased in the dying declaration that she was subjected to dowry demand and mental and physical torture and harassment for insufficient dowry after the marriage of the deceased with accused No. 1 in November, 1996 till the date of the incident (1st February, 1997) and even on the date of the incident and just prior to the incident. The accused did have adequate opportunity to meet with the evidence of the case as put up by the prosecution during the trial and we have no hesitation in holding that there would be no failure of justice if the accused are convicted of the offence punishable under Section 306 IPC by altering the conviction under Section 302 IPC.

29. Coming to the question of sentence, Mr Surti for the appellant-accused has submitted that accused No.1-husband is in custody since 6.2.1997 and has already undergone imprisonment for six years and that accused No. 2-mother in law was also in custody during the trial for about one month and thereafter is in custody since December 1997 upon conviction and, therefore, she has also been in jail for the last five years and three months. It is further submitted that the conduct of the accused in trying to extinguish the fire and taking the deceased to the hospital may also be taken into account. Moreover, accused No. 1 was an employees of the Railways and on account of the conviction by the trial Court, accused No. 1 has been dismissed from service and, therefore, the accused have been sufficiently punished.

30. Having heard the learned counsel for the parties, we are of the view that when we are altering the conviction for the offence punishable under Section 302 IPC to conviction for the offence punishable under Section 306 IPC, looking to the conduct of the accused and also considering the fact that accused No.1-husband has also been subjected to loss of government employment on account of the conviction by the trial Court and also considering the fact that accused No. 1 has been in jail for the last six years and accused No. 2 has been in jail for five years and three months, the interests of justice would be served if the accused are sentenced to suffer imprisonment for the period already undergone.

31. In view of the above discussion, we confirm the order of conviction under Section 498-A IPC, but the conviction of both the accused for the offence punishable under Section 302 IPC is altered to conviction for the

offence punishable under Section 306 IPC. Since accused Nos. 1 and 2 have already undergone imprisonment for 6 years and 5 years & 3 months respectively, the accused

are sentenced to imprisonment for the period which they have already undergone. The accused shall be released from jail, if not required in connection with any other offence or case.

The appeal is accordingly partly allowed to the aforesaid extent only.

(B.J. Shethna, J.)

(M.S. Shah, J.)
sundar/-